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In the Supreme Court of the United States

OCTOBER TERM, 1946

CIVIL AERONAUTICS BOARD, PETITIONER

v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Acting Solicitor General on behalf of the Civil Aeronautics Board prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 14, 1947, denying petitioner's motion to dismiss a petition for review filed by respondent Waterman Steamship Corporation.

OPINIONS BELOW

The opinion of the court below is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board is reported in 6 C. A. B. 857 (R. 118).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 14, 1947 (R. 413). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an order issued by the Civil Aeronautics Board granting and denying applications for certificates of public convenience and necessity to engage in overseas and foreign air transportation is subject to judicial review when such order has been approved by the President of the United States pursuant to the provisions of Section 801 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

In December 1940 Waterman Airline, Inc., a subsidiary of respondent, filed an application with the Civil Aeronautics Board seeking a certificate of public convenience and necessity under Section 401 of the Act to engage in air transportation between the United States and Puerto Rico (R. 42). Subsequently amended applications were filed, one of which substituted respondent as the applicant (R. 95, 96). Chicago and Southern Air

[1] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235 (49 U. S. C. 401, *et seq.*).

Lines, Inc., also filed an application with the Board which, as later amended, sought a certificate to engage in air transportation over various routes in the Caribbean, Central and South American areas, including a route between New Orleans, Louisiana, and San Juan, Puerto Rico, via certain specified intermediate points (R. 3–4, 232).

The Board consolidated for hearing under Docket No. 525 *et al.*, entitled "Additional Service to Latin America," the applications filed by 15 applicants (including those filed by respondent and by Chicago and Southern Air Lines, Inc.) seeking certificates of public convenience and necessity to engage in air transportation between the United States and points in Mexico, Central and South America, and the Caribbean area (R. 124–125). Prior to hearing copies of the various applications were transmitted to the President of the United States as required by Section 801 of the Act (R. 124). After hearings had been completed, the Board prepared an opinion and a proposed order granting and denying certificates of public convenience and necessity. Pursuant to Section 801, the decision of the Board, consisting of its opinion and proposed order and certificates, was submitted to the President for his approval (R. 125).

The proposed disposition of the applications was disapproved in part by the President, and

the Board's opinion and proposed order and certificates were returned to it for further action in conformity with the President's directions (R. 125).

An amended opinion and proposed order and certificates revised to reflect the desires of the President were again submitted to him and the President approved this revised disposition of the applications on May 22, 1946 (R. 263). The Board then published its opinion (R. 118) and the order signed by the President (R. 256). Included among the applications denied by this order was that of respondent (R. 263). The certificate granted to Chicago and Southern Air Lines, Inc. was approved on May 22, 1946 (R. 269–271).

After the Board had denied its application for rehearing and reconsideration (R. 328–330), respondent filed a petition in the court below seeking review of the Board's action (R. 1–9). The Board filed a motion to dismiss for lack of jurisdiction, or in the alternative to affirm (R. 27). Chicago and Southern intervened and filed a similar motion (R. 360, 388). By leave of court the motions were heard on an abbreviated record containing the applications, orders, and related documents pertinent to the jurisdictional issues raised (see R. 408).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006 (a) of the Act notwithstanding the

approval of the President, which the court stated it had "no power to question or review" (R. 411). The court also stated that it was aware "that this question was decided otherwise" by the United States Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that orders issued by the Civil Aeronautics Board after approval by the President of the United States pursuant to Section 801 of the Act are subject to judicial review under Section 1006 (a) of the Act.

(2) In holding that it has jurisdiction to review an order upon which it cannot render a judgment with finality and conclusiveness.

(3) In failing to grant the motion to dismiss filed by the Civil Aeronautics Board.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is admittedly in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. 2d 810.[2] This conflict should be resolved by this Court.

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[2] In the *Pan American* case, the court said (pp. 813–814):

> But it does not follow merely from the broad language of Section 1006 (a) that there may be a review of orders

2. The decision of the court below presents a question of importance in the administration of the Civil Aeronautics Act which has not been, but should be, determined by this Court. The issue is one which will arise in every proceeding to review an order granting or denying a certificate to engage in overseas and foreign air transportation. The public interest will be promoted by prompt settlement of the question by this Court.

3. The petition should be granted at this stage in the proceeding because the judgment sought to be reviewed is final on the question of jurisdiction. A conflict between circuit courts of

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for the issuance of certificates which the President shall approve or disapprove under Section 801, 49 U. S. C. A. § 601. * * *

* * * * *

It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, and not the Board, the ultimate arbiter. *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 60 S. Ct. 944, 84 L. Ed. 1259.

If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certificate, we would be placed in a

appeals and the importance of the issue raised by denial of a motion to dismiss moved this Court to grant certiorari before judgment on the merits in *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. Although the judgment below is not final on the merits, it is appropriate for review where, as here, it presents an issue "fundamental to the further conduct of the case." *Land* v. *Dollar*, No. 207 this Term, slip op. 2, decided April 7, 1947; *United States* v. *General Motors Corp.*, 323 U. S. 373, 377. No useful purpose would be served in allowing the court below to conduct a hearing on the merits

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position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006 (a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006 (a). Accordingly the motion to dismiss the appeal is granted * * *.

involving the printing and consideration of a voluminous record if that court has no jurisdiction to entertain the proceeding.

4. The decision below is in conflict with applicable decisions of this Court concerning the scope of judicial power. The court below conceded that Congress has given the President "what amounts to an absolute veto as to all orders of the Board respecting all the matters named in Sec. 801" and that this veto power "would persist as to any modification of such an order by the court under Section 1006 (c) or any new order framed by the Board under direction of the court" (R. 411). The court further said that it had "no power to question or review either the approval or disapproval of the President" and that "he does not have even to state his reasons" for approval or disapproval (*ibid.*). The court thus recognized that it could not render a judgment having finality and that any judgment which it might render would necessarily be advisory and subject to revision by the President. As the court said in the *Pan-American* case, *supra*:

> There is nothing in the act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, and not the Board, the ultimate arbiter.

Article III, Section 2, of the Constitution of the United States provides that the judicial power

shall extend to cases and controversies. It has long been established that courts created under this Article have no jurisdiction to enter a judgment which is merely advisory and which is not final and conclusive upon the rights of the parties.[3] It is also settled that a judgment is of this character if, as in the present case, it is subject to revision by the executive or legislative branches of the Government.[4]

The required action by the President on application for certificates authorizing overseas and foreign air transportation calls for exercise of discretion of a plenary nature in the field of international relations and in aid of national defense. Where questions of this nature overlap regulation of commerce with foreign nations, Congress may, as it has in Section 801, entrust the entire matter to the President.[5] See *United*

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[3] *Hayburn's Case*, 2 Dall. 408; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 697, 702–704; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401.

[4] Cases cited in note 3.

[5] The record of the *Latin American* proceeding, as disclosed in the Board's opinion, forcibly illustrates the impact and finality of presidential action. In rejecting the Board's disposition of certain particulars in the *Latin American* case, the President advised the Board that because of certain factors relating to our broad national welfare and other matters for which the President has special responsibility, he had reached conclusions which required the certification of two routes which the Board did not find justified on the basis of the record before it, the certification of another route to a particular carrier designated by the President,

States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318–324.

The court below was of the opinion that the Board's action is not final until the Board and the court have completed their functions and that *thereafter* the completed action must be approved by the President (R. 411). But Section 801 expressly directs the Board not to make public any action respecting applications for overseas and foreign air transportation until after presidential approval. Accordingly there can be no judicial review of Board action until *after* approval by the President and publication in accordance with his directions.

It is the Government's position that Section 1006 (a), interpreted in the light of the statute as a whole and applicable constitutional principles, does not authorize judicial review of Board action which can be taken only in conformity with approval given by the President. It does not seem necessary to elaborate further on the question of statutory construction at this time.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

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and the award of a certificate to a carrier other than the one proposed by the Board on the basis of evidence submitted to it. (R. 125.)

APPENDIX

Civil Aeronautics Act of 1938 as amended:

SECTION 1. As used in this Act, unless the context otherwise requires—

* * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(21) * * * "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

* * * * *

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof,

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and

necessity; otherwise such application shall be denied.

* * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof * * *

* * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(d) Upon transmittal of the petition to the Board, the court shall have exclusive juris-

diction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. * * *

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

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